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## Navigable Air Space and Property Rights

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## NOTES AND COMMENTS

### NAVIGABLE AIR SPACE AND PROPERTY RIGHTS

The Air Space Act of 1926 contains the following provisions:

"Sec. 10. Navigable Airspace. As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

"Sec. 4. Airspace Reservations. The President is authorized to provide by Executive order for the setting apart and the protection of airspace reservations in the United States for national defense or other governmental purposes and, in addition, in the District of Columbia for public safety purposes. The several States may set apart and provide for the protection of necessary airspace reservations in addition to and not in conflict either with airspace reservations established by the President under this section or with any civil or military airway under the provisions of this Act."

"Sec. 5. (b) The Secretary of Commerce is authorized to designate and establish civil airways and, within the limits of available appropriations hereafter made by the Congress, (1) to establish, operate, and maintain along such airways all necessary air navigation facilities except airports; and (2) to chart such airways and arrange for publication of maps of such airways, utilizing the facilities and assistance of existing agencies of the Government so far as practicable. The Secretary of Commerce shall grant no exclusive right for the use of any civil airway airport, emergency landing field, or other air navigation facility under his jurisdiction."

"Sec. 5. (f) Nothing in this Act shall be construed to prevent the Secretary of War from designating routes in the navigable airspace as military airways and prescribing rules and regulations for the use thereof on routes which do not conform to civil airways, established hereunder, or to prevent the Secretary of Commerce from designating any military airway as a civil airway, and when so designated it shall thereupon become a civil airway within the meaning of this Act, and the Secretary of War is hereby authorized to continue the operation of air navigation facilities for any military airway so designated as a civil airway until such time as the Secretary of Commerce can provide for the operation of such facilities."

"Sec. 11. Penalties. (a) It shall be unlawful, except to the extent authorized or exempt under Section 6.

(1) To navigate any aircraft within any airspace reservation otherwise than in conformity with the Executive orders regulating such reservation.

(5) To navigate any aircraft otherwise than in conformity with the air traffic rules."

The effect of these provisions on the property rights of landowners is a matter of general interest. The *usque ad coelum* theory of property rights in land was practically destroyed by the invention of the airplane. If that theory were to be maintained, sec. 10 would be unconstitutional as depriving the landowner of property without due process of law. The actual legal situation appears to be this: There was always a latent easement for air travel which is described in sec. 10. This latent easement became a patent easement when air traffic was sufficiently developed to make the easement important.

Under sec. 4 a different question arises with reference to airspace reservations. It is by no means clear that the public right of air navigation described in sec. 10, or the complete sovereignty of the airspace set forth in sec. 6, gives the United States any right to set apart any airspace reservations without making compensation therefor. The effect of this provision, coupled with the provisions of sec. 11, is to make it unlawful for a ranch-owner to fly an airplane over his own ranch if an airspace reservation, including air over that ranch, has been designated by the President, or by the several States. The effect of this provision is to deprive the landowner of the use of his property, and as such deprivation is made without any compensation to the landowner, its constitutionality is at least doubtful. It is hard to see how the power to make a reservation for space in the air is any greater than that to make a reservation for space on the ground. The ground space cannot be reserved without compensation, and there seems no reason for a different rule with reference to the airspace.

The establishment of airways rests on quite a different basis from the establishment of airspace reservations. The establishment of airways merely provides for the direction of air traffic. The establishment of airspace reservations provides for the exclusion of air traffic from the reservations.

The power of Congress to establish airways rests on its power to control interstate commerce. The power to establish airspace reservations can apparently rest only on the right of eminent domain. Congress, however, has taken a different view of the matter and seeks to appropriate airspace reservations without compensation. The chances appear to be against the courts sustaining this provision.

Washington, D. C.

EDWARD A. HARRIMAN.

## RESPONSIBILITY OF AIRPORT OWNERS

The following news item from the New York Herald Tribune of January 23, 1930, shows the importance of legislation for the protection of the owners and operators of airports. Whether the term "palpable negligence" is used in the bill, or is merely the phraseology of the reporter, does not appear. Negligence hitherto has been classed as gross, ordinary, and slight. The meaning of the term "palpable" appears to await judicial determination.

ALBANY, Jan. 23.—Owners and operators of aircraft and landing fields would be relieved of responsibility for personal injuries in aircraft accidents except in the case of palpable negligence, under terms of a bill offered in the Legislature today by Senator J. Griswold Webb, of Hyde Park, and Assemblyman Herbert B. Shonk, of Scarsdale, chairman and vice-chairman, respectively, of the State Aviation Commission. At the same time Senator Webb and Assemblyman Shonk proposed a bill extending for one year from March 1 the life of the commission, now the only state body exercising regulation over aeronautics.

There is considerable uncertainty as to responsibility after aircraft accidents, Senator Webb said, which is placing unnecessary obstacles before the progress of aviation in some sections of the state.

"We have had instances," he said, "indicating the necessity for such a bill. I might refer specifically to one excellent private landing field in the Adirondacks. It is the only available landing field for miles, and it was suggested that the owners might mark it in the usual way indicating it as a landing field. They had no objection to such use of the field, but their counsel informed them that, under the present wording of the law, they might be held responsible for any accident that might occur on the field to a plane whose pilot accepted the implied invitation to land there. This is manifestly unfair, so long as the field is in good condition."

Washington, D. C.

EDWARD A. HARRIMAN.

## AIR TRANSPORTATION COMPANIES AS COMMON CARRIERS

In the January number of the *Journal of Air Law*, page 38, the writer called attention to the attempt of counsel for air transportation companies to exclude by contract the liability of such companies as common carriers. This subject is receiving widespread public attention, as is shown by the following extract from a speech by Senator Bratton of New Mexico.

"One other thing, Mr. President: It has been suggested that these companies are private carriers and consequently cannot be controlled. I entertain not the slightest doubt that a company engaged in transporting persons and property for hire from a point within one State to a point within another State, even though the transportation takes place through the air, is a common

carrier. The fact that a railroad company drives its trains along the face of the earth and an aviation company drives its ships through the air, both transporting property and passengers for hire, does not differentiate the two by making one a common carrier and the other a private carrier.

"The essential element constituting a common carrier engaged in interstate commerce is that it transports persons and/or property for hire between points in different States. An aviation company doing that is essentially a common carrier and consequently subject to regulation. It borders on the point of absurdity to assert that a company which contracts to carry and actually it carries passengers say from Cleveland, Ohio, to Los Angeles, Cal., is a private carrier. It has in it every element of being a common carrier. Yet some of the companies contend that they are private carriers. The T. A. T. Co., which operates its planes from Columbus, Ohio, to a point in Oklahoma, and then from points in New Mexico to points in California, notably carries the statement upon some of its literature and in some of its advertising matter that it is a private carrier. The company itself should not engage in any such evasion. Whether it is regulated or unregulated, it becomes a common carrier the moment it engages in the business of carrying property and persons for hire between points in different States."

Mr. Bratton, in Congressional Record, January 28, 1930, p. 2587.

Washington, D. C.

EDWARD A. HARRIMAN.

## NOTES

RADIO ACT OF 1927—INTERPRETATION OF STANDARD OF "PUBLIC INTEREST, CONVENIENCE OR NECESSITY" AS APPLIED TO BROADCASTING STATIONS.—The Radio Act of 1927, as amended by the Act of March 28, 1928,<sup>1</sup> prescribes the standard of "public interest, convenience or necessity" for the guidance of the Federal Radio Commission in the exercise of its function with respect to the granting or refusal of applications for construction permits, station licenses, renewals of license, and modifications of license.<sup>2</sup> The question of the proper interpretation of this standard is squarely raised in two recent cases decided by the Court of Appeals of the District of Columbia on appeal from the Commission.<sup>3</sup>

The first of these cases, *Great Lakes Broadcasting Co. (WENR) v. Federal Radio Commission*,<sup>4</sup> involved a controversy between three stations in the Chicago area, WENR, WLS, and WCBD, regarding the disposition of operating time on the "cleared" channel of 870 kc. By the general reallocation of Nov. 11, 1928 (incident to its General Order 40), the Commission had continued WLS on that channel with 5/7 time and had assigned WENR

1. 44 Stat. 1162; 47 U. S. C. (Supp. 1928) Sec. 81.

2. See Sections 9, 11 and 21 of the Act.

3. Section 16 provides an appeal to the Court of Appeals of the District of Columbia from certain decisions of the Federal Radio Commission.

4. 37 F. (2d) 993 (decided Jan. 6, 1930).

to the channel with 2/7 time. WCBD had been removed from 870 kc. and assigned to a less desirable channel. Each station applied for modification of its assignment: WLS asking full time use of the channel, WENR, full or 1/2 instead of 2/7 time, and WCBD applying for reinstatement on 870 kc. with 2/7 time. The three applications were heard together by four of the five Commissioners and, the Commission having divided equally as to the proper disposition to be made, each application was denied. The applicants severally appealed to the Court of Appeals where the three appeals were treated as consolidated.

The Commission in its statement of grounds for decision enunciated the general underlying principles held by it to inhere in the standard of "public interest, convenience or necessity."<sup>5</sup> Although the members differed as to the proper application of these principles in the particular controversy, the general principles set forth were unanimously approved by the Commission.

The Commission emphasized priority of service as the first consideration in the application of the standard:

"The first important general principle in the validity of which the Commission believes is that, as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right."<sup>6</sup>

As between WENR and WLS, Station WLS not only was prior in establishment, but had used high power long before WENR,<sup>7</sup> and had been operating on the channel in question before WENR was assigned to it. The Court of Appeals, although it found no fault with the quality of service rendered by WLS, ordered its time of operation cut down from 5/7 to 1/2, and the time of WENR increased from 2/7 to 1/2. The established priority rights of WLS were dismissed with the words:

"It is true that WLS began broadcasting some time earlier than WENR, and that it was the first to be assigned to the channel in question. These facts, however, are not controlling, for neither station has any fixed right in the frequency as against the reasonable regulatory power of the United States." (P. 995.)

It would seem that the court ignores the vital question at issue,

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5. This was the first comprehensive statement issued by the Commission regarding the proper interpretation of the standard, although statements issued at the close of the hearings under General Order 32 in the summer of 1928 constituted a partial interpretation (Second Annual Report, pp. 152-170). It is quoted in part in the Third Annual Report, p. 32 *et seq.*

6. The Commission was careful to explain that as between stations of different classes (for example, a cleared channel station of 10,000 watts and a local station of 100 watts) the principle of priority may not control. Even though the smaller station may have a longer record of continuous service, it manifestly has not as long a record of service over the larger area. In the instant case, however, all three stations were in the same class. See Statement of Ground for Decision filed by the Commission.

7. Thereby having a longer record of service covering a large service area.

for the real question is not whether there is a fixed right as against an exercise of a reasonable regulatory power, but whether a *reasonable* regulation would not be based upon a recognition of priority, other elements being equal.

The Court of Appeals also considered priority rights in the second case, *Chicago Federation of Labor (WCFL) v. Federal Radio Commission*.<sup>8</sup> Station WCFL applied for modification of its license to authorize full time operation and transfer to the cleared channel of 770 kc., upon which WBBM and KFAB were then dividing time. Upon the denial of its application by the Commission, WCFL appealed to the Court of Appeals. The court upheld the rights of WBBM and KFAB, the established stations, and affirmed the decision of the Commission, saying in part:

"It is not consistent with true public convenience, interest or necessity that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them . . . unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them and appropriated to the use of other stations."

The standard of "public interest, convenience or necessity" in the Radio Act of 1927 undoubtedly derives from the similar standard of "public convenience and necessity" appearing in the public utilities laws of the states,<sup>9</sup> as the guide for state commissions in granting certificates of convenience and necessity.<sup>10</sup>

8. No. 4972, decided May 5, 1930, U. S. Daily, May 9, 1930 (not yet reported).

9. See the scholarly opinion of Judge Wilkerson in *United States v. American Bond & Mortgage Co.*, 31 F. (2d) 448, 457.

10. The close resemblance between a certificate of convenience and necessity and a license to operate a commercial radio station is apparent.

State statutes requiring certificates of public convenience and necessity before permitting a person to enter a given business are an express recognition of the economic, and often physical, limitations upon the number of persons who may, consistently with public welfare, be permitted to engage in that business. The most important economic considerations are found in the evils of excessive competition in naturally monopolistic businesses, due to extensive duplication of equipment and overhead which will eventually be reflected in rates charged the public, and possibly inadequate service. Obvious physical considerations arise in all those businesses which involve the use of streets, bridges or other public property, or which necessitate condemnation of private property. See *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277; *People ex rel Public Serv. Comm.*, 227 N. Y. 248, 125 N. E. 438; *Choate v. Ill. Comm. Comm.*, 309 Ill. 248, 141 N. E. 12; *Chicago, R. I. & P. Ry. Co. v. State*, 126 Okla. 48, 258 Pac. 874; *McLain v. Pub. Util. Comm.*, 110 Ohio S. 1, 143 N. E. 381.

In the field of radio communication the limitation is primarily physical: it is an inexorable principle of radio engineering that the number of persons who may simultaneously engage in radio broadcasting is definitely limited. See scientific principles set forth in *United States v. American Bond & Mortgage Co.*, 31 F. (2d) 448, 452-454; 1929 Report, Standing Committee on Radio Law (Amer. Bar Assoc.), p. 410 *et seq.*

In both fields of regulation the object to be attained is the development of an adequate service for the public.

In the granting of certificates of convenience and necessity the general rule is well established that a state commission will not allow a new utility to enter a field already occupied by another similar utility.<sup>11</sup> The corollary of this rule is that when the choice of applicants for operation in a new field lies between a new utility and a utility occupying an adjacent field, the existing utility is entitled to preference.<sup>12</sup> To these rules there are admittedly exceptions, namely (a) where the service rendered by the existing utility is unsatisfactory and inadequate,<sup>13</sup> and (b) where the new utility offers a new kind of service desirable to the public.<sup>14</sup>

Applying these principles to the WENR case it is difficult to understand the theory of the Court of Appeals in taking time away from WLS, the senior station, in order to give it to the junior station, WENR, inasmuch as the court acknowledged the excellence of the service rendered by WLS, and inasmuch as WENR did not propose any new service that WLS was not prepared to give.

In both the WENR case and the WCFL case the Commission, in its statement of grounds for decision, emphasized the proposition that the interest, convenience or necessity to be considered was that of the public at large and not that of individual broadcasters or of any particular sect, class or organization.<sup>15</sup> Both with respect to the claims of station WCBD (owned by Wilbur Glenn Voliva, head of a religious sect at Zion, Illinois), and those of station WCFL (owned by the Chicago Federation of Labor and purporting to be the voice of organized labor), the Commission definitely stated that

11. *Red Star Transp. Co. v. Red Dot Coach Lines*, 220 Ky. 424, 295 S. W. 419; *McLain v. Public Utilities Commission*, 110 Oh. St. 1, 143 N. E. 381; *Abbott v. Public Commission*, 48 R. I. 196, 136 Atl. 490; *State ex rel. v. Atkinson*, 275 Mo. 324, 204 S. W. 897; *West Suburban Transp. Co. v. Chi. & W. T. R. Co.*, 309 Ill. 87, 140 N. E. 56; *Superior Motor Bus Co. v. Community Motor Bus Co.*, 320 Ill. 175, 150 N. E. 668; *Chicago, R. I. & P. R. Co. v. State*, 126 Okla. 48, 258 Pac. 874; *Fornarotto v. Board of Pub. Util. Com.* (N. J.) 143 Atl. 450. In a large number of states the commission is directed by statute to consider the transportation service already furnished and the effect which the proposed service would have upon it.

12. This rule is supported by several strong decisions. *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill. 320, 122 N. E. 477; *Monongahela West Penn. Pub. Serv. Co. v. State Road Commission*, 104 W. Va. 183, 139 S. E. 744. See also *Chicago Ry. Co. v. Commerce Comm.*, 336 Ill. 51, 167 N. E. 840.

13. Even in this case by the majority rule, the existing utility is given an opportunity to improve its service before another will be allowed to enter the territory. See *Choate v. Ill. Comm. Comm.*, 309 Ill. 248, 141 N. E. 12.

14. These exceptions tend to overlap in practice. See as illustrations of the exceptions, *Chicago, R. I. & P. Ry. Co. v. State*, 126 Okla. 48, 258 Pac. 874; *Bartonville Bus Line v. Eagle Line*, 326 Ill. 200, 157 N. E. 175; *United Parcel Service* (Cal.), P. U. R. 1926 E, 321; *Coast Counties Gas & Electric Co. v. Sierra & S. F. Power Co.* (Cal.) P. U. R. 1917 C, 709.

15. See the similar principle enunciated by the courts with respect to certificates of convenience and necessity in the public utility field. *Milw. Ry. & Light Co. v. Milw. County*, 189 Wis. 96, 206 N. W. 201; *Fornarotto v. Board of Pub. Util. Com.* (N. J.), 143 Atl. 450; *McLain v. Pub. Util. Com.*, 110 Oh. S. 1, 143 N. E. 381; *Red Star Transp. Co. v. Red Dot Coach Lines*, 200 Ky. 424, 295 S. W. 419; *Choate v. Ill. Comm. Comm.*, 309 Ill. 248, 141 N. E. 12.



propaganda stations must give way to general public service stations when choice must be made between them. This principle seems inherently sound, but the Court of Appeals did not mention it in the decisions rendered.

In passing it should be noted that the Court of Appeals in the WCFL case expressly approved the rule of procedure adopted by the Commission requiring an applicant to specify the particular frequency desired. The rule was objected to on the ground that it throws the applicant into a controversy with the stations already occupying the frequency. The Court very wisely said, in answer to this objection:

"The number of available broadcasting frequencies is limited and they are so interrelated that none can be considered wholly without reference to others. It is necessary in the interests of justice that if new allotments are to be considered which may substantially affect those already granted to other stations, the latter should be notified and be permitted to intervene in the proceeding."

Member of the Chicago Bar.

KEITH MASTERS.

RADIO ACT OF 1927—APPEAL FROM FEDERAL RADIO COMMISSION—FUNCTION OF COURT OF APPEALS OF DISTRICT OF COLUMBIA.—The case of *Federal Radio Commission v. General Electric Company*<sup>1</sup> involved these facts. A New York station, WGY, applied for full time operation on a cleared channel which the Commission had assigned for exclusive evening use in the Fifth zone (the Rocky Mountain and Pacific Coast States).<sup>2</sup> The Commission denied full time to WGY and issued instead a renewal license specifying limited time. From this decision of the Commission WGY perfected an appeal to the Court of Appeals of the District of Columbia.<sup>3</sup> That court reversed the decision of the Commission and ordered that

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1. No. 122, Supreme Court of the United States, decided May 19, 1930, Adv. Ops. 1929-1930, p. 514.

2. By its General Order 40 of August 30, 1928, the Commission designated forty broadcasting channels or frequencies as "cleared" or "exclusive" channels, upon each of which only one station would be allowed to operate during the evening hours, and allocated these cleared channels equally among the five zones created by the Radio Act (Sec. 2).

The Commission made this reallocation because of the mandate it believed to be contained in the Davis Amendment of 1928 (Public Law No. 195, 70th Cong.).

3. Section 16 of the Radio Act of 1927 (44 Stat. 1162) provides that any applicant for a construction permit, for a station license or for the renewal or modification of an existing station license, whose application is refused by the Federal Radio Commission, may appeal from such decision to the Court of Appeals of the District of Columbia; directs that the grounds of appeal be stated and the revision be confined to them; requires the Commission to transmit a record together with a statement of the facts and grounds of its decision; allows the court to take additional evidence; and provides that the court "shall hear, review and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just."

WGY be allowed unlimited time on the channel in question.<sup>4</sup> The Commission then applied for and was granted a writ of certiorari by the Supreme Court. Writ of certiorari dismissed. *Held*: that the Supreme Court has no jurisdiction to review a decision of the Court of Appeals rendered on appeal from the Federal Radio Commission.

The court, after an examination of the pertinent provisions of the Radio Act, stated that a decision rendered by the Court of Appeals on appeal from the Commission is not a judicial judgment, but is a mere administrative or legislative decision,<sup>5</sup> and that the Supreme Court being invested by the Constitution with judicial power only, cannot review such decisions.<sup>6</sup>

The Supreme Court did not discuss the various objections urged against the theory that the Court of Appeals exercises administrative functions on appeal from the Commission. Section 16, which allows an appeal to the Court of Appeals from a decision of the Commission refusing an application, allows an appeal from a decision of revocation of license to district courts of the United States (as well as to the Court of Appeals of the District of Columbia). The procedure provided is exactly the same, including the provision for additional evidence and the scope of the judgment which may be entered by the appellate tribunal. It was argued that since it is not constitutionally possible to confer administrative or legislative powers on a District Court,<sup>7</sup> the Act contemplated that both appellate tribunals should exercise judicial functions.

The decision ignored the action of the Court of Appeals in issuing a stay order requiring the Commission to refrain from interfering with WGY pending the appeal. The Court of Appeals has repeatedly issued such stay orders and this function, it would seem, is only consonant with a judicial power.<sup>8</sup> The Supreme Court waved aside the further fact that the Court of Appeals assessed

4. Reported as *General Electric Company v. Federal Radio Commission*, 31 F. (2d) 630. See notes, 42 Harvard Law Review 948; 28 Mich. L. R. 194.

5. The Supreme Court declares that the province of the Court of Appeals under the Radio Act of 1927 is comparable to its former province on appeals from administrative decisions of the Commissioner of Patents (Sections 59-62, title U. S. C.) before that jurisdiction was transferred to the Court of Customs & Patent Appeals by the Act of Mar. 2, 1929, c. 488, 45 Stat. 1475.

6. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700-701.

Congress, of course, has power to invest the Court of Appeals of the District of Columbia with the functions of an administrative tribunal, inasmuch as that court is not a constitutional court. *Keller v. Potomac Electric Power Co.*, *supra*.

7. *Keller v. Potomac Electric Co.*, *supra*; *Ex Parte Bakelite Corporation*, 279 U. S. 438; *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716.

8. *In re McFarland*, 30 App. D. C. 365.

costs against the Commission,<sup>9</sup> which would most certainly appear to be a characteristic of judicial decision.<sup>10</sup>

This decision fixes the status of the Court of Appeals as a super-Commission, and, perforce, places parties complaining of the Commission in a rather difficult position. Suppose the Commission makes a clearly erroneous decision substantially affecting the rights of a station, and that this decision is wrongly affirmed by the Court of Appeals; since appeal to the Supreme Court is denied, the only remedy left the station (other than the possibility of an action against its opponent station or stations) is suit for injunction restraining the Commission, or other extraordinary remedy,<sup>11</sup> in the Supreme Court of the District of Columbia. The appeal from this latter court is to the Court of Appeals, which we are assuming has already erred in this very controversy; so the circle is complete, except for review in the Supreme Court of the United States on writ of certiorari.

Member of the Chicago Bar.

KEITH MASTERS.

RADIO ACT OF 1927—APPEAL FROM FEDERAL RADIO COMMISSION—APPEALABLE DECISION.—Appellant was one of a group of press associations and newspapers, seeking authority to engage in point-to-point wireless telegraphy. On Dec. 22, 1928, the Commission approved<sup>1</sup> individual applications of members of this group asking permission to construct stations for point-to-point press communication, but the construction permits were never actually issued because of differences thereafter arising within the group. Appellant, dissatisfied with the number of channels allocated to it, repudiated the action of the Commission. On June 20, 1929, the Commission revoked its action of Dec. 22, 1928, and ordered the construction permits to be issued to a trustee for the group as a whole. Appellant appealed from this decision to the Court of Appeals of the District of Columbia, alleging that it was thereby deprived of rights acquired under the order of Dec. 22nd. *Held*: that appellant had no grounds for appeal. Appeal dismissed.<sup>2</sup>

In its decision the court adopts a strict construction as to what constitutes an appealable decision of the Commission. Section 16 of the Radio Act of 1927<sup>3</sup> provides that an appeal may be taken to the Court of Appeals from a decision of the Commission denying

9. It is interesting to note that the Court of Appeals has not subsequently assessed costs in any appeal from the Commission, although the Commission's decisions have been reversed in two instances since the WGY case.

10. See *Tesla Electric Co. v. Scott et al.*, 101 Fed. 524.

11. In *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111 (C. A., D. C. No. 1929), it was hinted that such a suit might lie.

1. The exact nature and effect of the Commission's order of this date was in issue.

2. *Universal Service Wireless, Inc. v. Federal Radio Commission*, No. 5005, Court of Appeals of District of Columbia, decided May 5, 1930, U. S. Daily, May 8, 1930 (not yet reported).

3. 44 Stat. 1162.

an application for (a) construction permit, (b) station license, (c) renewal of existing license, or (d) modification of existing license. The court examined the grounds thus specified, held that applicant did not expressly fall within one of the four specified, and dismissed the appeal, saying:

"The right of appeal being a statutory one, the court cannot dispense with its express provisions, even to the extent of doing equity."

This represents a recession from the liberal position regarding appealable decisions taken by the court in *Richmond Development Corporation v. Federal Radio Commission*<sup>4</sup> where an application for extension of time when the station should be completed (which is required to be specified in construction permits) was treated as an application for a construction permit and a denial of the application by the Commission was regarded as an appealable decision although there had been two previous extensions and the last extension had expired 15 days before the application in question was made.<sup>5</sup>

Member of the Chicago Bar.

KEITH MASTERS.

RADIO ACT OF 1927—REGULATIONS FOR PREVENTION OF INTERFERENCE UNDER SECTION 4(F)—POWER OF COMMISSION TO MAKE CHANGES IN STATION ASSIGNMENTS WITHOUT PRIOR HEARING.—In its statements of grounds for decision in *Courier-Journal and Louisville Times Co. (WHAS) v. Commission*<sup>1</sup> the Federal Radio Commission attempts to justify its General Order No. 87 of April 7, 1930, and the changes in broadcasting station assignments made pursuant thereto. Under the Commission's action WHAS was to have undergone a change in frequency from 820 kc. to 1020 kc.

The point made by the Commission that Section 4(f) of the Radio Act of 1927 gives it power to make such changes in station assignments without opportunity for hearing to the stations affected *prior* to the effective date of the changes has been discussed at length in the writer's article appearing in this issue of the JOURNAL OF AIR LAW.<sup>2</sup> The Commission, in citing the *City of New York*<sup>3</sup> and *Great Lakes Broadcasting Co.* cases<sup>4</sup> in support of its action, fails to note that the reallocation of November 11, 1928 (which was based on General Order No. 40 of August 30, 1928, and a tentative allocation announced September 11, 1928), was *preceded* by opportunity for hearing during a period of two months, under a

4. 35 F. (2d) 883 (decided Nov. 4, 1929).

5. See *Practice & Procedure before the Federal Radio Commission*, Louis G. Caldwell, JOURNAL OF AIR LAW, Vol. I, p. 144, at p. 159.

1. Court of Appeals, Dist. of Col., Special Calendar, No. 5190.

2. *Appeals from Decisions of the Federal Radio Commission*; see also *Practice and Procedure before the Federal Radio Commission*, J. of A. L., Vol. I, No. 2 (April, 1930), p. 157.

3. 36 F. (2d) 115.

4. 37 F. (2d) 993.

procedure announced on September 11, 1928, which contemplated that all dissatisfied stations might be heard *prior* to the effective date. The Commission's reduction of WGY's hours of operation, which was held in the *General Electric Company* case<sup>5</sup> to be a denial of a renewal application and appealable, was made pursuant to General Order 40 (of which General Order 87 is simply an amendment).

The important feature of the statement, however, is that, for the first time in the history of the Commission, a basis for minimum geographical separation between stations on the same and on adjacent channels is formally established. This is done in terms of a unit denominated an "interference mile." What the unit is, and on what basis it has been calculated, do not appear in the statement, but a chart is set forth tabulating the minimum mileage separation which should exist between stations of equal power. The chart is as follows:

Power	On Same Frequency	Separated by 10 kc.	Separated by 20 kc.	Separated by 30 kc.
50 Watts	220 Mi.	63 Mi.	30 Mi.	22 Mi.
100 "	300 "	85 "	40 "	30 "
250 "	650 "	185 "	90 "	65 "
500 "	900 "	250 "	125 "	90 "
1 Kilowatt	1200 "	350 "	170 "	120 "
5 "	1850 "	530 "	260 "	180 "
10 "	2200 "	630 "	320 "	220 "
15 "	2400 "	680 "	340 "	240 "
25 "	2600 "	750 "	370 "	260 "
50 "	3000 "	860 "	430 "	300 "

The statement announces that the chart has been adopted by the Commission.<sup>5a</sup>

It is possible to criticize the standard set up in the chart as still being far too low, but allowance must be made for the practical situation with which the Commission is faced on account the grossly excessive number of broadcasting stations and its past failures to reduce the number. Until the number is reduced (particularly of regional stations) technical ideals must be sacrificed. For example, it has commonly been considered necessary that, for good (not to mention excellent) results, 500 watt stations should be separated by 1200 miles and 1000 watt stations by 1800 miles and that 5000 watt stations should not be duplicated anywhere in the country on the same channel. The chart seems to forecast the destruction of some of the cleared channels unless stations now assigned to those channels obtain sufficient increases in power. If the chart is open to such an interpretation it constitutes *pro tanto* a serious step backward from General Order No. 40 and the re-allocation of November 11, 1928.<sup>6</sup>

5. 31 F. (2d) 630.

5a. Since the above was written, the writer has been informed that this tabulation has not been officially adopted by the Commission, but that it was prepared by its engineering division for its own use.

6. This was the judgment of Dr. J. H. Dellinger, Chief of Radio Section, Bureau of Standards (formerly chief engineer of the Commission),

The small minimum geographical separations on *adjacent* channels shown in the chart are also hard to justify technically, especially in comparison with the separations proposed on channels removed 20 kc. and 30 kc. from the principal channel. Their correctness, of course, depends a great deal upon what degree of selectivity of receiving apparatus is taken as a standard, as well as upon what particular frequency is in question.

Nevertheless, the fact that such a chart has been adopted represents a stride forward in the reduction of interference in the broadcast band (except in so far as it may be used to destroy cleared channels). The failure on the part of the Commission to adopt and observe *any* minimum standards in the past had led to the virtual destruction of good reception on practically all of the local and regional channels. On some twenty-four of the regional channels there are geographical separations of from 650 down to slightly over 200 miles between stations on the same channel which ought to be separated,<sup>7</sup> under the Commission's figures, by at least 900 to 1200 miles. While it will take time to make the existing set-up conform to the standards specified in the chart, the standards should serve at least as a bulwark against any further sacrifice of the interest of the listening public to the insistence of individual broadcasters (provided, of course, that the present number of cleared channels is not diminished). It is to be hoped that, instead of definitely adhering to these standards, the Commission will take steps to bring them to a higher level.

The portion of the statement in which the Commission attempts to justify General Order 87 and its application to the particular stations affected is not altogether convincing. The Commission claims that its action would improve interference conditions on sixteen cleared channels for a total of 3676 interference miles; that conditions would be unchanged on three cleared channels; and that on three cleared channels there would be a total loss of 143 interference miles. To reach these totals, however, the Commission has had to disregard cases where a reduction in geographical separation was brought about between stations on adjacent cleared chan-

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John V. L. Hogan and C. M. Jansky, Jr., in testimony heard by the Commission on July 23, 1928. See *Radio Facts and Principles*, Govt. Pr. Off. 1928. The standards agreed to by these eminent authorities have frequently been urged by the Commission before the Court of Appeals, and were set forth in its brief filed with the United States Supreme Court in *Federal Radio Commission v. General Electric Co.*, Adv. Ops., 1929-1930, p. 514. The basis for them is set forth in *U. S. v. American Bond & Mortgage Co., et al*, 31 F. (2d) 448. See Report of Standing Committee on Radio Law, A. B. A. Reps., 1929, Vol. 54, pp. 424-426.

7. The low technical standards which some of the Commission's engineers have testified to recently in hearings before the Commission are illustrated by the Commission's statement just filed in *Bennett v. Commission*, No. 5208. In this case the engineer testified that "during winter months heterodyne interference would be caused by stations of 1000 watts power in a radius of 500 to 700 miles operating on the same frequency." Such recessions from sound principles are hard to justify, and result in encouraging the ever-insistent pressure for the authorization of new stations.

nels but the reductions were not great enough to bring the separation below the minimum distance shown on the chart. This method of calculation ignores a fundamental fact. Interference between stations on adjacent channels cannot be dealt with in absolute terms. No matter how far apart from each other (unless the distance is so great that detectible signals from the two stations do not anywhere penetrate the same area), stations on adjacent 10 kc. channels will cause cross-talk to each other *somewhere* in the intervening area. The greater the geographical separation, the greater the interference-free area will be for each station; *any* reduction in the geographical separation will reduce the service area of the station and decrease its listening public.

The figures set forth in the above chart do not mean, therefore, that the specified separations will obviate interference, but merely that they will probably avoid substantial interference over a service area which the Commission has apparently arbitrarily determined upon as a proper one to be expected by a given station, the dimensions of which have not, however, been made public.

According to the Commission's figures, WHAS was scheduled to suffer a loss of 25 interference miles. It is common knowledge that 1020 kc. is substantially inferior to 820 kc. (although both are cleared channels), the lower frequencies being capable of reliable service over a greater area free from fading, less subject to absorption by steel buildings, etc. WHAS should, therefore, have an opportunity in some forum to have it determined whether any considerations of public interest, convenience or necessity, require that it be subjected to this injury.

There is no need for apprehension over the number of hearings which may result from compliance with the provisions of Section 11 of the Act by affording a prior hearing to stations adversely affected by such action of the Commission as General Order 87. Of the 26 stations involved in the shifts all but three acquiesced. The issues at such a hearing, where the respective merits of the stations in program service are not directly in question, probably may be confined to the technical considerations on which the Commission relies in justification for its action and with respect to which the Commission's engineers may or may not be right. If they are right no harm is done; if they are wrong, a public service is rendered in demonstrating it. It may easily happen that some other shift will better accomplish the purpose, and avoid injustice to existing stations. The only way to find out is to hold a hearing before inflicting grievous injury not only on the stations but perhaps also on hundreds of thousands of listeners.

Member of the Chicago Bar.

LOUIS G. CALDWELL.

### COMMENTS

AIR COMMERCE REGULATIONS—JURISDICTION OF FEDERAL COURT—[U. S. Dist. Ct. Ohio]—Action at law instituted in Federal District Court. Defendant's dirigible flying at an altitude of about 150 to 200 feet above plaintiff's land frightened plaintiff's horses. The horses ran away with the wagon

that plaintiff was loading and plaintiff was injured. Petition alleged negligence in several particulars, the first of which was in flying at an altitude lower than 500 feet and thus in violation of the Air Traffic rules promulgated by the Secretary of Commerce in accordance with the authority given him by the Air Commerce Act: 49 U. S. C. A. 173-(e). Demurrer overruled. It did not appear from the petition whether the flight was interstate or intrastate.

Held: (1) The Air Commerce Act 49 U. S. C. A. Sec. 181-(5) prohibiting the navigation of aircraft otherwise than in conformity with the air traffic rules impliedly gave to one injured by a violation of these rules an action for damages. (2) If defendant's flight were interstate the petition sufficiently stated plaintiff's claim as one arising under the laws of the United States to give the federal court jurisdiction the petition alleging a violation of the Air Commerce Act. If the flight were intrastate, the court would have jurisdiction on the ground of violation of the air traffic rules if it were necessary to apply the 500 feet minimum altitude rule to intrastate flights in order to protect interstate movements. (3) If plaintiff be unable to prove any necessity for applying the federal altitude rule to intrastate movements that would constitute a failure of proof so far as that ground of negligence was concerned; but whether interstate flight or intrastate flight, the petition, setting up the altitude rule and alleging a negligent violation of the rule to plaintiff's damage, sufficiently states a case under the federal law which should not be dismissed for lack of jurisdiction. *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. (2d) 761 (Feb. 1929).

The application of the air traffic rules to intrastate flights raises the question of greatest significance in this case. The case seems to be the first one arising under the air traffic rules, and in its application to intrastate flights, is one of first impression. It indicates the attitude which the federal courts will probably adopt in determining the extent to which the federal government will be allowed to control aviation.

The first point decided, i. e., that the Air Commerce Act of 1926 impliedly gave a right of action to a person injured by another's violation of the air traffic rules, admits of but little argument: *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874 (1916). "The Supreme Court has decided that the Safety Appliance Acts and other similar Acts of Congress, imposing obligations on railroads to equip their locomotives and cars in the manner thereby prescribed, create by implication a civil liability for injury or death resulting from a violation of these acts." (*Reynolds*, "The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States," p. 345.) That, where a right of action is given by federal law, a suit based upon that right is within the jurisdiction of the federal courts, is also clear: "Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts": *McGoon v. Northern Pacific Ry.*, 204 F. 998 (1913); *Rose's* "Federal Jurisdiction and Procedure," Sec. 230, 234, 958. "Thus, any suit which seeks to assert a right given by the Interstate Commerce Act, is clearly one arising under the laws of the U. S. . . ." (Sec. 958, supra.)

That the failure to prove the necessity of the application of the altitude rule to intrastate flights would not deprive the court of jurisdiction is also well supported by authority: *Ward v. Todd*, 103 U. S. 327 (1880); *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175 (1909). As generally stated, the rule is that if it appears from the plaintiff's complaint that, in any aspect which the case may assume, the right of recovery may depend upon the construction of Federal Statutes, and if the right of recovery, so far as it turns upon the construction of such statutes, is not merely a colorable claim, but rests on a reasonable foundation, a federal question is involved which is adequate to confer jurisdiction, although the right of recovery is also predicated on other grounds, not involving federal questions, and although the case is ultimately decided upon grounds not involving the determination of any federal question: *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 68 F. 2



(1895). Thus, the federal court can acquire jurisdiction through the allegation of violation of the air traffic rule and can then determine the case on the other allegations of negligence.

From the point of view of air law, however, the important question in this case is, Do the air traffic rules apply to and govern flights purely intrastate? The answer given by the district court is that they *probably* do. The ground on which the federal government is permitted to control intrastate flights is the familiar "burden on interstate commerce" theory, as appears from the opinion of West, District Judge: "If the circumstances and conditions under which air commerce is carried on are such that it is necessary for the altitude rule to apply to and regulate intrastate flights in order to protect interstate movements, then it will so apply the same as to an interstate flight. . . . It is apparent that all or nearly all of these rules [air traffic] must be applied to both intrastate and interstate craft in order to secure the safety of the latter, and that with respect to these matters the federal regulations must be paramount. Conflicting state rules could not be allowed." The court here applies the burden theory, as developed by the railroad, by watercraft, and the telegraph cases, to aircraft with the apparent result that the federal government is to control all flying, so far as the rules of flights are concerned. Then comes a concession: "This is not, however, so evident with respect to the 500 foot altitude rule involved here. It is a little difficult to see in what respect interstate aircraft navigating at or above the prescribed elevation can be endangered or interfered with by intrastate craft moving in a lower plane. However dangerous this may be to the intrastate craft and to persons and property on the ground, the danger to interstate craft is not apparent."

From the beginning, the power of the federal government to control aviation, interstate and intrastate, was based upon the commerce clause of the constitution. The treaty making power, the admiralty power, and the war power, were all suggested as being sufficient to support a Federal Air Act. The power over commerce, however, was adopted by Congress as being the most appropriate and effective basis for federal control over aviation. As soon, also, as government control of aviation was conceived necessary, it was realized that the control and regulation, whether Federal or State, must be uniform. Most writers doubted the power of Congress to control *all* aviation; accordingly, they advocated a uniform State law. Others thought it possible that the Supreme Court would uphold federal control of all aviation under the Commerce power and under the burden theory. The Air Commerce Act passed in 1926 left the power divided between the nation and the States, except that it provided that *all flying* must be done in conformity with the air traffic rules. (49 U. S. C. A., Sec. 181 (a)-(5).)

The burden theory may be summarized as follows: whenever there exists such an interblending and interdependency between interstate and intrastate commerce that the freedom, well-being, or safety of the former depends upon the latter, congress, or an administrative body delegated with national authority, may regulate that intrastate commerce in so far as it is necessary to preserve the freedom, well-being, or safety of the commerce within the exclusive control of the Federal Government. (*Robert's "Federal Liabilities of Carriers,"* Sec. 14.) Congress may prevent or remove any condition, act or statute, the effect of which is to burden interstate commerce. This principle, upon which the *Neiswonger* case relies, was furthest extended in the railroad cases.

There seem to be at least three different kinds of burdens: physical, financial, and administrative. The best example of physical burdens appears in the cases under the Safety Appliance Act. This Act provided that certain safety appliances be used on railroads engaging in interstate commerce. In *Southern Ry. Co. v. U. S.*, 222 U. S. 20 (1911), a suit to recover penalties for violation of the act, the defense was that the cars were being used only in intrastate commerce. The court held that the act must be applied to *all* cars used on a railroad engaged in interstate commerce, regardless of whether used in moving intrastate or interstate traffic, in order to protect those cars used

in interstate traffic. The analogy between railroad traffic and air traffic, though not perfect, due to the difference in the nature and extent of the highways, is quite apparent. For other cases on physical burdens, see *Sanitary District of Chicago v. U. S.*, 266 U. S. 405 (1925), holding that the federal government may enjoin the diversion of water from Lake Michigan on the ground that such continued diversion is an obstruction to interstate commerce; *Western and Atlantic Railroad Co. v. Western Union Telegraph Co.*, 138 Ga. 420 (1912), holding that a telegraph company will not be permitted to condemn the right of way of a railroad company for the construction and maintenance of lines of telegraph in such a manner as to materially interfere with the railroad company in the operation of its trains; and *Carter v. U. S.*, 38 F. (2d) 227 (1930), to the effect that the Federal Government, in protection of interstate commerce, may require the treatment of domestic [intrastate] cattle to eradicate Texas fever; and numerous cases holding void, as burdens on interstate commerce, state statutes requiring railroads to make certain switch connections or stops.

The most recent extension of the burden principle has been its application to the rates of railroad carriers. Where intrastate rates are so low that interstate carriers coming in competition with the intrastate carriers are forced to increase their rates in other districts in order to make up for the loss resulting, the Interstate Commerce Commission has power to increase the intrastate rates to remove the burden upon or discriminations against interstate commerce: *The Minnesota Rate Cases*, 230 U. S. 352 (1912), *The Shreveport Case*, 234 U. S. 342 (1913), *New York v. U. S.*, 257 U. S. 59 (1921), and *Railroad Commission v. C. B. & Q. Ry.*, 257 U. S. 563 (1921). These decisions show a disposition to sustain the exercise of federal authority over commerce purely intrastate whenever the Court is able to discern a reasonably close connection between the subject of federal legislation and interstate commerce. (*Reynold's* "The Distribution of Power" *supra*, p. 143; *Beale and Wyman*, "Railroad Rate Regulation," Sec. 100; *Fuller*, "Interstate Commerce," p. 67.)

The burden principle has been applied in many other types of situations: *Atlantic-Pacific Stages v. Stahl*, 36 F. (2d) 260 (1929), applied to a state statute requiring carriers to secure a certificate of convenience and necessity; *Western Union Telegraph Co. v. Boegli*, 251 U. S. 315 (1920), a state statute penalizing the telegraph company for delay in delivery of messages; *Shafer v. Farmer's Grain Co.*, 268 U. S. 189, a state statute regulating the sale of domestic grown wheat; and other cases on statutes licensing, taxing, and otherwise regulating commerce.

The *Neiswonger* case, in extending the burden principle to air flights, has followed the trend of the Supreme Court as indicated very clearly by the burden cases, especially the Safety Appliance Cases and the Rate Cases. The same attitude has been adopted in the decisions involving federal control over radio: *Whitehurst v. Grimes*, 21 F. (2d) 787 (1927): "Radio Communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance [imposing a license on radio broadcasters] is void, as a regulation of interstate commerce." Accord: *U. S. v. American Bond and Mortgage Co.*, 31 F. (2d) 448 (1929).

Another possible approach towards the question of federal control over intrastate aviation is in treating the air as a highway and as subject to the same control as are navigable waters. (*Kintz*, "The Federal Air Traffic Rules," 1 Air Law Review, p. 265; *Zollmann*, "Governmental Control of Aircraft," 53 Am. L. R. 897.) Were the rules regarding navigable waters, as laid down in *The Oyster Police Steamers of Maryland*, 31 F. 763 (1887), applied to air travel, state control over aviation would be insignificant. The framers of the Air Commerce Act favored the Commerce power rather than the admiralty

power, but if for any reason the commerce power proves inadequate to support federal control over aviation, we shall probably see the navigable water analogy attempted. The history of the cases under the admiralty power, however, throws a serious doubt upon the possibility of so applying the power.

The *Neiswonger* case has been supported to some extent by dicta in *Craig v. Boeing Air Transport, Inc.*, 1929 U. S. Av. Rep. 101 (Oct. 1929): "It may be conceded that such a suit at law for violation of an air traffic rule would be one arising under the laws of the United States and removable, but before it can be so held, it must be clear that a violation of such rule is alleged."

Seven years ago, William P. MacCracken ("Air Law," 57 Am. L. Rev. 97, 1923), predicted that federal control over intrastate flights would probably be constitutional and state authority very limited. The means suggested was the burden principle. The prediction seems in a fair way to be realized. If the Supreme Court will uphold the application of the air traffic rules to all flights, state control will be very limited. The Safety Appliance cases, the Rate cases, the Radio cases, and the *Neiswonger* case all point to such a result and most of the writers on the subject have anticipated such federal control. (*Zollmann*, "Law of the Air," Secs. 48, 50, 52, 58; *Logan*, "Aircraft Law Made Plain," pp. 34, 38, 41; *Fixel*, "Law of Aviation," pp. 109, 113; *Wooley and Hill*, "Airplane Transportation," p. 328 (Article by W. P. MacCracken); *Greer*, "Aviation From a Legal Point of View," 15 A. B. A. Journal 305, 308; *People v. Smith*, 196 N. Y. S. 241, 1922.)

That the States will still have some control over aviation is admitted on all sides. The Air Commerce Act itself includes by its terms intrastate flights only in regard to the air traffic rules. Licensing, taxing, inspection, and other regulations are not exclusively within the federal power.

As for the air traffic rules, the weak point in the argument for their application to all flights is that it is conceivable that there may be intrastate flights under conditions which do not "in any wise interfere or impinge upon interstate flying." (*Hotchkiss*, "Aviation Laws," Sec. 57.) If it is possible that intrastate flights under one set of regulations would not endanger or interfere with interstate flights under a different set of regulations in regard to altitude, speed, signals, lights, emergency landings, etc., then the constitutionality of exclusive federal control would seem dubious. As pointed out in the *Neiswonger* case, the possibility of interference with interstate commerce in the case of the altitude rule is not free from doubt. In the case of emergency landings and in inclement weather, however, the altitude rule, also, would seem to call for a single control. As planes and flights increase in number and complexity, the necessity for uniformity, and the probability that intrastate flights will be considered as essentially connected with interstate commerce, will become all the greater. Until the Supreme Court acts, the extent of federal control will be uncertain. Everything seems to point to a federal control over aircraft similar to that exercised over railroads.

ABRAHAM FISHMAN.

**AIRCRAFT—COLLISION—DEGREE OF CARE REQUIRED IN CONDUCT AND OPERATION IN LANDING AIRCRAFT—[Wisconsin]**—The Supreme Court of Wisconsin has recently had before it an interesting question, namely, the amount of care required to be used by an aviator in landing a plane so as to exempt him, or his employers, if he happens to be an agent, from liability for damages caused to a plane stalled on the runway. *Greunke v. North American Airways Co.* (1930), 230 N. W. 618.

The defendant operated an airport maintaining, as part of its business, hangar rental, transportation of passengers, freight and mail, and a school of instruction for students. West, an agent of the defendants and a licensed transport pilot, operated the plane which caused the accident. The plaintiff, who was also a licensed transport pilot, owned a plane which he kept at the defendant's hangar. The day on which the accident occurred, West, in the course of instructing a student, preceded the plaintiff in the air. West made one or two landings while the plaintiff was in the air but went back up. The plaintiff came in landing on the runway but making a "dead stick" landing,

i. e., a landing made with a stalled motor. While he was endeavoring to start the motor, in order to get the machine off the runway, West came in and touched the runway, bounced, and thereafter collided with the plaintiff's plane, causing considerable damage to both machines. The action was brought to recover damages. The defendant alleged that West used care in making his landing, but that owing to the light at the time and the color of the plaintiff's machine, it was difficult to see the plane standing on the runway. There was also some evidence of a custom to pull stalled planes off the runway in accordance with the rule that "landing planes have the right of way over aircraft on the ground." (*U. S. Dept. of Commerce Rules of Flying.*)

The court held that the rules of law applicable to torts on land would apply. In its instructions to the jury the trial court said: "West was to use the highest degree of care the men of reasonable vigilance and foresight ordinarily exercise in the practical conduct and operation of an airplane and making a landing." On appeal, this was held to be prejudicial error and that West's duty was to use ordinary care as that term has been defined saying that, "ordinary care, however, is not the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of their affairs." "Without doubt the defendant was required to use a high degree of care, which care would be the care that the great mass of men, so circumstanced as he, would ordinarily use."

The rules of law applicable to torts on land under such circumstances are as follows: If a man engage in an act which the circumstances indicate may be dangerous to others he must take all the care which prudence would suggest to avoid an injury. *McGrew v. Stone* (1866), 53 Pa. St. 436. More vigilance and caution are required in the doing of acts at a place where injury is liable to occur from them than where no injury may be anticipated: *Indianapolis Union Ry. Co. v. Boettcher* (1891), 131 Ind. 82. The controlling test of the exercise of reasonable care is not what has been the practice of others in a like situation, but what a reasonably prudent man would have done in such a situation: *Chi. Mil. & St. P. R. Co. v. Moore* (1909), 166 Fed. 663. "High degree of care" denotes no more than a degree of care commensurate with the risk of danger: *N. J. Fid. & Plate Glass Ins. Co. v. Lehigh Valley R. R. Co.* (1918) 92 N. J. L. 467. Ordinary care is not a constant but a varying condition, dependent upon each particular case and proportioned to the dangerous nature of the instrumentality employed and the probability of injury: *Tyler v. Gulf C. & S. F. Ry. Co.* (1918), 143 La. 177. The highest degree of care is not required of operators of automobiles on the public highways, but the driver is under the duty of exercising reasonable care to avoid inflicting injury to others who may be lawfully using the same highway: *Tenn. Mill & Feed Co. v. Giles* (1924), 211 Ala. 44. The operator of an automobile on a public highway must use such care as a reasonably prudent man would under like circumstances, the highest degree of care not being exacted: *Hester v. Hall* (1914), 17 Ala. App. 25. The operator of an automobile must use such a degree of care in the operation of the machine with a view of averting injury to others: *Henderson v. O'Leary* (1922), 177 Wis. 130. In determining what is reasonable or ordinary care, control over the instrumentality claimed to have caused the injury is an element for consideration, and the amount of prudence and vigilance which must be exercised in order to reach the required standard increases with one's increased power of control over such instrumentality: 8 C. J. 695. If we may assume some analogy between aircraft and automobiles, we are aware that, automobiles are not to be regarded as dangerous per se: *Parker v. Wilson* (1912), 179 Ala. 361; *Landry v. Oversen* (1919), 187 Ia. 284; *Cunningham v. Castle* (1908), 127 N. Y. App. Div. 580. Also automobiles are not to be regarded in the same category with locomotives, dynamite, and other dangerous contrivances: *Vincent v. Crandall & Godley Co.* (1909), 115 N. Y. S. 600; *Goodman v. Wilson* (1914), 129 Tenn. 464; *Steffan v. McNaughton* (1910), 142 Wis. 49.

The instructions which the lower court gave to the jury seem to be based on the theory that the care which should be required would be based on the instrumentality used and the circumstances involved in the situation, following

the rules quoted above; and that while an airplane is not per se a dangerous instrument, still it is such an instrumentality as requires one to use the highest degree of care in its operation. The Supreme Court in holding that this was prejudicial error held that the pilot's duty was not to use the highest degree of care but ordinary care which, being a varying figure according to the instrument used, would be a high degree of care in the case of aircraft. The question might be raised as to how the jury is to distinguish between "highest degree of care that men of reasonable vigilance use in the practical conduct and operation of an airplane and making a landing," and the instruction that the test is whether or not the pilot used ordinary care, defining ordinary care as meaning a high degree of care which men so circumstanced as he (meaning men landing a plane?) would use.

From the standpoint of air law the case merely holds that the operator of an airplane is not required to use the highest degree of care but some high degree of care considering the instrument used and which is here held to be included in the phrase "ordinary care."

WM. K. TELL.

**AIRPORT—OPERATION BY CITY—LIABILITY OF CITY FOR DAMAGES FROM NEGLIGENT OPERATION OF MUNICIPAL AIRPORT—[Alabama]**—The plaintiff, a property owner, brought an action against the City of Mobile for damages caused to his property by reason of the draining of a municipal airport owned and operated by the defendant municipality. It appeared that the plaintiff was a lower, servient owner whose property adjoined the airport, but that in draining the airport, ditches were constructed under the direction of the city engineer in such a manner that the natural flow of water upon the plaintiff's land was greatly increased with the result that his bean crop was destroyed. The defendant demurred to the complaint on the ground that it was exercising a governmental function in the maintenance of the airport, and therefore was not liable. The demurrer was overruled, and a jury in the circuit court found \$350 damages for the plaintiff. Upon appeal this decision was affirmed in the appellate court: *City of Mobile v. Lartigue* (Ala. App. 1930) 127 S. 256.

It is well settled that, in absence of a statute, a city is not liable in tort for the negligence of its agents where such negligence occurs in the discharge of a governmental function as distinguished from a corporate function: *City of Wooster v. Arbenz* 116 Oh. St. 281, 156 N. E. 210 (1927); *Hammon v. City of Waterbury* (1927) 106 Conn. 13, 136 Atl. 876; *Bolster v. Lawrence* (1917) 225 Mass. 387, 114 N. E. 722; *Scibilia v. Philadelphia* (1924) 279 Pa. 549, 124 Atl. 273; *Roumbos v. City of Chicago* (1928) 332 Ill. 70, 163 N. E. 361; Dillon, *Municipal Corporations* (5th ed.) Vol. 4 § 1625 seq.; 19 R. C. L. 392; 43 C. J. 921. The court in the instant case recognized this generally admitted non-liability of municipalities in their discharge of governmental functions, but concluded that a city in operating an airport is not in the exercise of a governmental power. It was a case of first impression in Alabama, and, it is to be believed, in the country.

While the distinction as concerns tort liability between governmental and corporate powers of a city is well known, the application to a particular set of facts has often proved troublesome to the courts, and has led to divergent views throughout the country. However, it seems quite well settled that a municipality is not liable for injuries due to the defective condition or negligent management of its property when used for the following purposes: school buildings: *Howard v. Worcester*, 153 Mass. 426, 27 N. E. 11; *Daniels v. Grand Rapids*, 191 Mich. 339, 158 N. W. 23; police and fire stations: *Wilcox v. Rochester*, 190 N. Y. 137, 82 N. E. 1119; *State v. Joplin*, 189 Mo. App. 383, 176 S. W. 341; prisons: *Evans v. Kankakee*, 231 Ill. 223, 83 N. E. 223; *Bowling Green v. Rogers*, 142 Ky. 558, 134 S. W. 921, and hospitals: *Bolster v. Lawrence*, cit. supra. In the maintenance of public parks, streets, and sewers the decisions are not so uniform. Some courts have found them governmental functions: *Nelson v. City of Spokane* (Wash. 1918), 176 P. 149; *Luebken v. City of Hanover* (Kansas), 283 P. 501; *Harris v. District of*

*Columbia*, 256 U. S. 650, 41 S. Ct. 610, 43 C. J. 972, 977, 1170; others have found them corporate functions with consequent liability: *City of Waco v. Branch* (Texas 1928), 5 S. W. 2nd 498; *Denver v. Porter*, 126 Fed. 288 (Colo.); *Van Dyke v. Utica*, 196 N. Y. S. 277; *Barthold v. Philadelphia*, 154 Pa. 109, 26 Atl. 304.

Alabama, itself, is committed to the doctrine that the maintenance of public streets and sidewalks is a corporate rather than a governmental function: *City of Birmingham v. Whitworth*, 218 Ala. 603 (1929). But the same court has found, in a recent case, that a city in maintaining a public park is exercising a governmental function, and therefore is not liable for the negligent management of a public golf links in the park: *Williams v. City of Birmingham*, 219 Ala. 19 (1929).

The court in the instant case was inclined to feel that the operation of an airport was more akin to the maintenance of public streets than of public parks, and so found the city liable. As indicated the precise question had not arisen before, and the Alabama court was not bound by any conclusive decision either in its own courts or the courts of the other states.

The adjudicated cases on municipal airports in this country up to the present time have been concerned with the right of cities to establish airports under state legislation, and their power to issue bonds or levy taxes for their erection and maintenance. The majority of the state legislatures have directly authorized their municipalities to establish such airports: 1929 *U. S. Aviation Reports*, 403-876; and the reported cases have been uniform in holding that cities may incur indebtedness in acquiring and maintaining airports: *City of Wichita v. Clapp* (1928), 125 Kan. 100, 263 P. 12; *Dysart v. City of St. Louis* (1928), 11 S. W. 2nd 1045; *Douty v. Mayor of Baltimore* (Md. 1928), 141 Atl. 499; *Hesse v. Rath* (1928), 249 N. Y. 435, 164 N. E. 342; *State ex rel. Hile v. City of Cleveland* (Ohio 1927), 160 N. E. 241; *Ennis v. Kansas City* (Mo. 1928), 11 S. W. 2nd 1054; *State ex rel. City of Lincoln v. Johnson* (Neb. 1928), 220 N. W. 273; *McClintock v. City of Roseburg* (Ore. 1929), 273 P. 331. Thus only indirectly has the nature of a municipality's function in establishing and maintaining an airport been passed upon. The establishment of an airport is a public purpose: *Dysart v. St. Louis*, supra; *Ennis v. Kansas City*, supra; is a city purpose: *Hesse v. Rath*, supra. Three courts have said an airport is a public utility, for the support of which a city may issue bonds: *City of Lincoln v. Johnson*, supra; *Hile v. City of Cleveland*, supra; or levy taxes: *McClintock v. City of Roseburg*, supra. In a recent Kansas case it has been held that the devotion of a reasonable portion of a public park to an airport comes within the legitimate use of public parks: *City of Wichita v. Clapp*, supra.

In arriving at its conclusion the Alabama court was inclined to pour new wine into old bottles, and this presented a convenient, though not necessarily a definitive answer to a question which is bound to arise again in other states. Whether the decision in the instant case will be followed is conjectural, but along these lines several observations may be made.

All states do not accept Alabama's application of the distinction between governmental and corporate functions, as is shown by the fact that in several jurisdictions cleaning, repairing, and oiling of city streets is a governmental function: *Louisville v. Hehemann*, 161 Ky. 523, 171 S. W. 165; *Johnson v. Somerville*, 195 Mass. 370, 81 N. E. 268; and cases cited supra. Thus, even accepting the analogy of the Alabama court, others may come to a different decision. Again, it is to be noticed that Alabama is one of the states in which the establishment of airports by municipalities has not been authorized by the state legislature. see 1929 *U. S. Av. R.* cit. supra. Just what significance this fact has, is not entirely clear, but in view of the fact that many of the acts have impliedly recognized the governmental nature of the function of establishing and maintaining municipal airports: (see especially laws of Georgia, Kentucky, Connecticut, Ohio, Montana in 1929 *N. S. Av. R.* 403) it may become an important distinction in future adjudications of this question. Lastly, it is to be pointed out that at least four states have recognized expressly the governmental nature of the function by providing that a municipal-

ity shall not be liable for negligence in the operation or maintenance of an airport. Two of these statutes providing for non-liability is limited to injuries to persons: *Texas Laws*, 1929 Ch. 28, § 3; *Wisconsin Laws*, 1929 Ch. 464, § 1; one is not so limited: *S. Carolina Laws*, 1929 Act 562, § 2; and the other provides that the liability shall be no greater than that imposed for the maintenance of public parks: *Iowa Laws*, 1929 Ch. 138, § 9. As suggested by an Alabama court in *Williams v. City of Birmingham*, supra, this question is ultimately one for judicial interpretation and not legislative declaration, yet it is not clear that considerable weight would not be given to such a legislative provision. The Alabama court admitted that it did so in the *Williams* case where it faced a statutory declaration that the maintenance of public parks was a governmental function or power. It is at least to be noted that the appellate court in the instant case had no such statutory declaration to contend with.

DOUGLASS PILLINGER.

AIRCRAFT — AIRPORT — TRESPASS — NUISANCE — COMMON LAW DOCTRINE MODIFIED—[Massachusetts]—Plaintiff owned a large country estate next to which the defendant company acquired land for a private airport, and in its operation many flights were made over the entire estate at high altitudes, one or two flights at less than 500 feet, and numerous flights as low as 100 feet over the outlying wood track nearest the air port in taking off and landing "whenever the conditions of wind and weather has made it necessary or convenient." No direct damage resulted, and the master found that the noise from the flying planes was not so great or so continuous as to materially interfere with the material comfort of persons of ordinary sensibilities so as to constitute a nuisance. The owner sought an injunction to prohibit flying above his property "solely on the ground of trespass and the nuisance resulting from its continuance," and to prohibit the operation of the airport because it must necessarily result in trespassers over the plaintiff's land. The lower court denied the injunction, and the Supreme Court, in a somewhat circuitous opinion, upheld the lower court: *Harry Worcester Smith et al. v. New England Aircraft Co., Inc. et al.* (Mass. 1930) 170 N. E. 385.

For the first time the Supreme Court of any state was squarely presented with a question of the property rights of the subjacent owner in the airspace above his land, and the use of the action of trespass to prevent invasion by airplanes. Although jurists had discussed the question at length (Zollmann, "Law of the Air" (1927) pp. 1-29; Hotchkiss "Aviation Law" (1928) pp. 12-27; Hazeltine, "Law of the Air" (1910) pp. 74-78) there have been only two decisions in this country, both by lower courts, passing upon the question of trespass by airplane prior to the present case. (*Commonwealth v. Nevin* (Pa. 1922) 2 Dist. and County Rep. 241; *Johnson v. Curtis Northwest Airplane Co.* (Minn. 1923) 1928 U. S. Av. R. 242; see Hotchkiss p. 21.) The right of harmless passage was in each case upheld, as has been done in the few continental cases which have considered the question. (*Assinguant Mange v. Societe Farman* (1913) 21 Jurid. Rev. 321; *Huertebrise v. Esnault Pelletier Farman* (1919) 53 Am. L. Rev. 732.)

The present court assumed that the underlying owner's rights were limited to "the airspace which is now used or may in the future be used in the development of the underlying land." The plaintiff referred to the Latin maxim "*Cujus est solum ejus est usque ad coelum*," but expressly refrained from basing his action on its literal interpretation as granting to him, the subjacent owner, complete property rights to all heights. He argued that the flights made by the defendant as low as 100 feet interfered with the present use of the estate, and was sufficient basis for his action. A settlement of the vexed question of whether the underlying owner has exclusive control of the airspace above his property to all heights was thus reached by the form of the pleadings. This at once assumes that the subjacent owner has vested rights in the upper airspace, and that those rights are limited to the space necessary for the present use of his property. The function of the Federal and Massachusetts Air Navigation Acts was to define the upper extent of

the exclusive property rights of the land owner—500 feet being the limit when the property is not used by tall buildings. The statutes are passed under the authority of the police power to regulate a right to fly, which already existed, in the interest of safety. To account for the arbitrariness of the statutes in fixing a definite limit to the property rights, the court declared that the legislature has the power to take away private rights in order to preserve the public's right to fly at a reasonable height.

The court asserted the following rules of law upon which it based its decision:

(1) The upper airspace is within the jurisdiction of the State, and is not detached from sovereign control as are the high seas.

(2) The private ownership of the airspace is assumed to be limited in altitude to what is necessary for the present use of the property.

(3) The Federal Air Navigation Act and the Massachusetts Statute do not create a right to navigate the air, but merely recognizes the already existing right to fly over private property, and regulates it through the exercise of the police power.

(4) The legislature may fix an arbitrary altitude above which flying will be permitted—55 feet in the open country—unless the landowner makes use of his land by building to an unusual height.

(5) In fixing the altitude for flying, the legislature may properly delimit the private rights of the landowner under the police power in adjusting his conflicting interests with those of the public in flying.

(6) Flying below the statutory limit constitutes a technical trespass, except in cases of take-offs and landings, when a reasonable height is permitted.

(7) An injunction against flying below the statutory limit will not be granted for mere repeated trespasses when no right of easement will follow, unless the trespass amounts to a nuisance because of noise, vibration, or frequency of flights.

In applying the above rules of law to the situation confronted, the court concluded: (1) That flying above 500 feet did not constitute a trespass; (2) That the one or two flights at less than 500 feet and the probability of similar flights in the future did not warrant injunctive relief, as no injury or interference with the valuable use of the plaintiff's property had been shown; (3) That the flights as low as 100 feet in taking off and landing were an unreasonable invasion, and constituted trespasses, but that an injunction would not be granted as the subjacent land was woodland and the flights did not interfere with its utility; (4) That nominal damages for trespass would not be granted because the plaintiff asked only for an injunction.

The outcome reached by the court is the only one compatible with the development of air transportation. If every flight over private property were a trespass, for whose repetition the owner could secure an injunction, the effect on aviation would be fatal. (19 Green Bag 708.) The authority for the extreme view of property rights lies in the literal acceptance of the "cujus est solum" maxim, which was introduced into England during the reign of Edward I, when flying was only a fanciful dream. The purpose of a maxim is to summarize the law and not to extend it. "To the extent that the maxim *cujus est solum* has been actually applied by the courts, to that extent is it law." (Bouvé, "Private Ownership in Airspace," 1 Air Law Review, 232, 248.) The cases applying the maxim involve trespasses relatively near the surface such as shooting over another's land (*Kenyon v. Hart* (1865) 34 Law Journal Rep. 87; *Clinton v. Berry* (1888) 4 Time L. R. 8), overhanging tree branches (*Grandona v. Lovdal* (1889) 78 Cal. 611), projecting cornices (*Harrington v. McCarthy* (1897) 169 Mass. 492), protruding buildings (*Codman v. Evans* (1863) 89 Mass. 431), and thrusting arms over division fences (*Hannabalon v. Session* (1902) 116 Ia. 457). One writer, in commenting on this case (1 Air Law Review 272), shows that there could necessarily be no case authority for the invasion of the upper airspace until the recent development of aviation, and the authority is confined to declarations of jurists and the dicta of cases.



While the actual decision of the case represents a fair compromise between the interests of the landowner and the aviator, the opinion of the court is obscured by the original assumption that the property rights of the underlying owner only "extend to all reasonable heights above the underlying land." This leaves the question unanswered as to the extent of the ground owner's rights in unoccupied airspace if the plaintiff's pleading had not been restricted as it was in this case. If there had been no statutory limitations upon these rights the court would have been called upon to decide what was the reasonable extent of the landowner's rights, and if the plaintiff had not admitted that his rights were limited to a reasonable extent, then the court would have had to decide if reasonableness was the criterion for measuring their extent. Unfortunately this deprived aviation of the decision of an important court on the extent to which the landowner *can* claim rights to the upper space, and the court did not choose to grasp the opportunity to settle this question before considering the question of the reasonableness of the defendant's flight in the situation before it.

EDWARD C. SWEENEY.